RHB Bank Bhd v Wadasbina Sdn Bhd & Anor

HIGH COURT (KUCHING) — SUIT NO 22–88 OF 2003-I
CLEMENT SKINNER J
6 DECEMBER 2005

Civil Procedure — Judgment — Default of appearance — Application to set aside — Application to set aside judgment dismissed by deputy registrar — Appeal by second defendant against deputy registrar — Whether defence on merits shown — Whether triable issues raised — Judgments and orders

Upon the application of the first defendant to it, the plaintiff, at the request of the second defendant, agreed to grant the first defendant an overdraft facility of RM35m ('the OD facility'). The terms and conditions on which the OD facility was granted were set out in a letter of offer which was duly accepted by the first defendant ('the Letter of Offer'). As part of the security for the OD facility, the second defendant executed in favour of the plaintiff a charge and two continuing letters of guarantee in the sum of RM20m and RM30m respectively ('the Letters of Guarantee'). The plaintiff alleged that the first defendant was in default of its obligations under the OD facility and that the second defendant was in breach of its obligations under the letters of guarantee and commenced legal action against them. The writ of summons was duly served and received by the second defendant at its registered office. On the second defendant's failing to enter an appearance a judgment in default of appearance was duly entered against it. The second defendant applied to set aside the judgment in default. After hearing the second defendant's application to set aside the default judgment, the learned deputy registrar dismissed it. The plaintiff also obtained judgment against the first defendant who had also not taken any steps to set it aside.

Held, dismissing the appeal:

(1) The suit by the plaintiff was not a charge action brought under O 83 of the Rules of the High Court 1980 where the plaintiff is seeking to enforce its statutory remedy of sale against any of the second defendant's lands that were charged to it. Neither was the suit in personam based on the charge instruments. Therefore the terms of the charge instrument which the second defendant refers to were irrelevant. The second defendant was being sued as a guarantor, to repay what was owed by the first defendant in respect of the OD facility made available to the first defendant (see para 15).

(2) One of the terms on which that OD facility was made available to the first defendant was that the plaintiff was entitled to vary the rate of interest at its absolute discretion. When the plaintiff did reduce the first defendant's rate of interest, it did so at the written request of the first defendant, and also gave the

first defendant written notice of the reduction. The terms in the letter of offer did not impose any obligation on the plaintiff to give notice of variation of interest rate of the OD facility to the guarantors of the first defendant. As between the plaintiff and the second defendant, their obligations to each other are spelt out in the letters of guarantee (see para 15).

(3) There was nothing inconsistent with the rate of interest claimed by the plaintiff. The bona fides of the second defendant in putting forward the variation of interest point as a defence must be seriously questioned. The variation resulted in a reduction of the sums payable in the way of interest by the first defendant. This in turn meant a reduction in the second defendant's liability as guarantor. No sensible person would pursue such a course of argument which was clearly detrimental to his own interest. Such an argument was perverse. It was not put forward genuinely. It lacked bona fides (see para 19).

(4) The allegation that there was a collateral agreement that the plaintiff agreed to accept a lesser sum than was currently being claimed was a very vague, imprecise and equivocal assertion. There was no indication that the plaintiff had agreed to a lesser sum than was currently claimed (see para 25).

(5) The second defendant's assertion that the plaintiff had failed to take into account the interest payments has been shown to be unfounded and baseless. The plaintiff has produced as exhibit, a statement of account of the first defendant in which detailed calculations of interest charged and the dates of credits into the account are shown. This account showed that the interest payments have been duly credited and taken into account in calculating the balance owed by the first defendant (see para 31).

(6) Judgment in default has been entered against the first defendant. To date the first defendant has not made any attempt to set aside the judgment or even to challenge the judgment sum. If as the second defendant alleges, certain payments have been made on behalf of the first defendant which have not been taken into account by the plaintiff, meaning in turn that judgment was entered against the first defendant for an excessive sum, then it is strange that no attempt has been made to question the judgment (see para 31).

(7) Section 56 of the Legal Profession Act 1976 and the rules made thereunder have no application whatsoever in Sarawak. That law only applies in West Malaysia and has not been made operational in Sarawak. Sarawak has its own regulations to regulate the conduct of advocates in the state. Pursuant to the powers contained in s 17 (a) of the Advocates Ordinance, Cap 110 Laws of Sarawak, the Advocates (Practice and Etiquette) Rules 1988 have been made. Rule 56 is pari materia with s 56 of the Legal Profession Act 1976. Under r 56, the name of the advocate and solicitor of the other side or his firm must appear on the court record. There was no evidence that the name of the second defendant's advocate or the name of his firm was on the court record in the suit when the plaintiff's lawyers took steps to enter the default judgment. Under r 56 the plaintiff's lawyers would be bound by the rule if the fact of representation was known to them. It lay in the mouth of the second defendant to now complain about the conduct of the plaintiff's lawyers when it was the

second defendant's own lawyers who took no steps to inform the plaintiff's lawyers that they were or would be acting for the second defendant in the suit, so that the plaintiff's lawyers would then be bound by the second limb of r 56 and have to comply with its provision (see para 35).

(8) There was no requirement that the writ should have been served on the second defendant's lawyers unless the second defendant's lawyers had indicated in writing to the plaintiff's lawyers that they had authority to accept service of process on behalf of the second defendant. There is no evidence before the court that the plaintiff's lawyers were ever informed that the second defendant's lawyers had authority to do so (see para 36).

(9) While the first defendant and the second defendant may be liable to repay the same debt, their obligation to do so was not a joint one; it was several. Whereas the obligation of the first defendant as borrower arose under the Letter of Offer, that of the second defendant arose under the letters of guarantee. The plaintiff has two distinct causes of action against the first and second defendant respectively; against the first defendant as borrower and against the second defendant as guarantor. They were not joint contractors in that a judgment signed against one will discharge the other. The plaintiff's cause of action against the second defendant as guarantor could not have merged in the judgment obtained against the first defendant which was based on a distinct and separate cause of action (see para 40).

(10) By agreeing to provide the plaintiff with an absolute discretion in cl 18 of the letters of guarantee whether to enforce its rights under the guarantee either before or after resorting to any other means of obtaining payment, the second defendant cannot now be heard to complain when the plaintiff exercised that right. Further, by cl 19 of the letters of guarantee the second defendant expressly agreed that any sums not recoverable on the footing of a guarantee, shall nevertheless be recoverable from it as the sole or principal debtor. Given the above clauses in the letters of guarantee, it was open to the plaintiff to proceed simultaneously against the second defendant as guarantor and exercise its statutory remedy of sale under the law as well (see para 50).

[Bahasa Malaysia summary

Pada permohonan defendan pertama, plaintif, pada permintaan defendan kedua, bersetuju memberikan defendan pertama kemudahan overdraf sebanyak RM35 juta ('Kemudahan OD'). Terma dan syarat Kemudahan OD tersebut dinyatakan di dalam surat tawaran yang mana telah diterima oleh defendan pertama ("Surat Tawaran"). Sebagai jaminan kepada Kemudahan OD tersebut, defendan kedua memeterai satu gadaian yang memihak kepada plaintif dan dua pucuk surat jaminan berterusan yang masing-masingnya dalam jumlah RM20 juta dan RM30 juta ('Surat-surat Jaminan"). Plaintif mendakwa bahawa defendan pertama telah ingkar pada tanggungjawabnya dibawah kemudahan OD tersebut dan bahawa defendan kedua telah mengingkari tanggungjawabnya dibawah Surat-surat Jaminan dan memulakan tindakan undang-undang terhadap mereka. Writ saman telah disampaikan dan diterima oleh defendan kedua di pejabat alamat berdaftarnya. Pada kegagalan defendan kedua memasuki kehadiran satu penghakiman ingkar kehadiran telah dimasukkan

terhadapnya. Defendan kedua memohon untuk mengenepikan penghakiman ingkar tersebut. Selepas mendengar permohonan defendan kedua untuk mengenepikan penghakiman ingkar tersebut, yang arif Penolong Pendaftar menolak permohonan itu. Plaintif juga telah mendapat penghakiman terhadap defendan pertama dan defendan pertama tidak mengambil sebarang tindakan untuk mengenepikan penghakiman tersebut.

Diputuskan, menolak rayuan:

(1) Tindakan guaman plaintif bukannya satu tindakan gadaian dibawah A 83 Kaedah-kaedah Mahkamah Tinggi 1980 dimana plaintif ingin menguatkuasakan remedi penjualan berkanunnya terhadap mana-mana tanah defendan yang dicgarkan kepadanya. Ianya juga bukannya satu guaman personam berdasarkan suratcara-suratcara gadaian. Dari itu, terma-terma suratcara gadaian yang mana dirujuk oleh defendan kedua adalah tidak relevan. Defendan kedua disaman sebagai seorang penjamin, untuk membayar kembali apa yang dihutang oleh defendan pertama berhubung dengan Kemudahan OD yang diberikan kepada defendan pertama (lihat perenggan 15).

(2) Salah satu terma Kemudahan OD yang diberikan kepada defendan pertama adalah plaintif berhak untuk menukar kadar faedah pada budibicara mutlaknya. Apabila plaintif menurunkan kadar faedah defendan pertama, ia berbuat demikian pada permintaan bertulis defendan pertama, dan, ia juga memberikan notis penurunan kepada defendan pertama. Terma-terma Surat Tawaran tidak mengenakan sebarang obligasi keatas plaintif untuk memberi notis pertukaran kadar faedah Kemudahan OD tersebut kepada penjamin-penjamin defendan pertaman. Di antara plaintif dan defendan kedua, obligasi-obligasi mereka terhadap satu sama lain dinyatakan di dalam Surat-surat Jaminan (lihat perenggan 15).

(3) Tiada apa yang tidak konsisten dengan kadar faedah yang dituntut oleh plaintif. Tujuan bona fide defendan kedua menggunakan pertukaran kadar faedah sebagai satu pembelaan hendaklah dipersoalkan secara serius. Pertukaran tersebut menyebabkan pengurangan jumlah yang kena dibayar dalam bentuk faedah oleh defendan pertama. Ini juga bererti yang jumlah yang dijamin oleh defendan kedua sebagai penjamin juga berkurangan. Tiada seorang yang waras akan menggunakan penghujjahan yang secara nyata menjejaskan kepentingannya. Penghujjahan sebegitu adalah bertentangan. Ianya tidak digunakan dengan ikhlas dan tanpa bona fides (lihat perenggan 19).

(4) Dakwaan yang mengatakan bahawa terdapat satu perjanjian kolateral yang plaintif bersetuju untuk menerima jumlah yang lebih rendah dari apa yang sekarang ini dituntut adalah satu pernyataan yang tidak jelas, tidak tepat dan taksa. Tiada indikasi bahawa plaintif telah bersetuju dengan jumlah yang kurang dari apa yang sekarang ini dituntut (lihat perenggan 25).

(5) Dakwaan defendan kedua yang plaintif telah gagal mengambilkira bayaran-bayaran faedah telah dibuktikan tidak berasas. Plaintif telah mengemukakan sebagai exhibit, satu pernyataan akaun defendan pertama yang

mana di dalamnya dinyatakan secara terperinci perkiraan faedah yang dikenakan dan tarikh-tarikh kemasukkan kredit kedalam akaun defendan pertama. Akaun ini menunjukkan bahawa bayaran-bayaran faedah telah dikreditkan dan diambilkira dalam mengira baki yang dihutang oleh defendan pertama (lihat perenggan 31).

(6) Penghakiman ingkar telah dimasukkan terhadap defendan pertama. Sehingga kini defendan pertama tidak membuat sebarang percubaan untuk mengenepikan penghakiman tersebut atau mempertikaikan jumlah penghakiman. Jika sebagaimana yang didakwa oleh defendan kedua, bayaran-bayaran tertentu telah dibuat bagi pihak defendan pertama tidak diambilkira oleh plaintif, ini bermakna yang penghakiman yang dimasukkan terhadap defendan pertama adalah untuk satu jumlah yang terlebih, maka adalah pelik yang tiada percubaan dibuat untuk mempertikaikan penghakiman tersebut (lihat perenggan 31).

(7) Seksyen 56 Akta Profesion Guaman 1976 dan kaedah-kaedah yang dibuat dibawahnya tidak mempunyai sebarang applikasi langsung di Sarawak. Undang-undang tersebut hanya digunapakai di Semenanjung Malaysia dan tidak beroperasi di Sarawak. Sarawak mempunyai peraturan-peraturannya sendiri untuk mengawasi perilaku peguambela-peguambela di negeri tersebut. Dibawah kuasa-kuasa yang terkandung dibawah s 17 (a) Ordinan Peguamcara-Peguamcara, Cap 110 Undang-undang Sarawak, Kaedah-kaedah Peguambela (Amalan dan Etiket) 1988 telah digubal. Kaedah 56 adalah pari materia dengan s 56 Akta Profesion Guaman 1976. Dibawah k 56, nama peguambela dan peguamcara pihak bertentangan atau firmanya mestilah tertera pada rekod mahkamah. Tiada keterangan yang nama peguambela defendan kedua atau nama firmanya di dalam rekod mahkamah dalam guaman ini apabila peguam plaintif memasukkan penghakiman ingkar. Dibawah k 56 peguam-peguam plaintif terikat dengan kaedah ini jika mereka mengetahui fakta representasi ini. Ianya tidak wajar jika defendan kedua sekarang ini mengadu mengenai perilaku peguam plaintif apabila peguam defendan kedua yang sendirinya tidak mengambil sebarang tindakan untuk memberitahu peguam plaintif bahawa mereka bertindak atau akan bertindak selaku peguam defendan kedua dalam tindakan guaman ini, yang akan membuatkan peguam plaintif terikat dengan bahagian kedua kaedah 56 dan hendaklah mematuhi peruntukan-peruntukannya (lihat perenggan 35).

(8) Tidak terdapat keperluan di mana writ hendaklah diserahkan terhadap peguam defendan kedua melainkan jika peguam defendan kedua memberi indikasi secara bertulis kepada peguam plaintif yang mereka mempunyai kuasa untuk menerima serahan bagi pihak defendan kedua. Tiada keterangan di hadapan Mahkamah bahawa peguam plaintif diberitahu yang peguam defendan kedua mempunyai kuasa berbuat demikian (lihat perenggan 36).

(9) Walaupun defendan pertama an defendan kedua mungkin bertanggungjawab untuk membayar hutang yang sama, obligasi mereka bukanlah bersama; ianya berasingan. Dimana obligasi defendan pertama sebagai pemimjam berbangkit dari Surat Tawaran dan obligaso defendan kedua berbangkit dari Surat-surat Jaminan. Plaintif mempunyai dua klausa tindakan yang berbeza terhadap defendan pertama dan defendan kedua masing-masingnya; terhadap defendan

pertama sebagai peminjam, dan terhadap defendan kedua sebagai penjamin. Mereka tidak pengkontrak bersama dimana penghakiman terhadap yang satu akan mengugurkan yang satu lagi. Klausa tindakan plaintif terhadap defendan kedua tidak boleh dicantumkan didalam penghakiman yang didapati terhadap defendan pertama yang didasarkan pada kausa tindakan yang berbeza dan berlainan (lihat perenggan 40).

(10) Dengan bersetuju untuk memberikan plaintif budibicara mutlak dibawah klausa 18 Surat-surat Jaminan tersebut untuk menguatkuasakan hak-haknya dibawah jaminan tersebut samada sebelum atau selepas menggunakan cara lain untuk mendapat bayaran, defendan kedua tidak boleh sekarang ini merungut apabila plaintif menggunakan haknya. Selanjutnya, di bawah klausa 19 Surat-surat Jaminan tersebut defendan kedua secara nyata telah bersetuju bahawa sebarang jumlah yang tidak dapat kembali dibawah jaminan itu akan dapat didapatkembali dari beliau sebagai penghutang tunggal atau utama. Dengan klausa-klausa sebegini di dalam Surat-surat Jaminan itu, ianya terbuka kepada plaintif untuk memulakan secara serentak tindakan terhadap defendan kedua sebagai penjamin dan juga menggunapakai hak jualan berkanunnya dibawah undang-undang (lihat perenggan 50).]

Notes

For cases on default of appearance, see 2 Consolidated Subject Index and Table of Cases *Mallal's Digest* (4th Ed)

Cases referred to

Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors [1994] 4 MLJ 105 (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)
Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra' ayat [1979] 1 MLJ 23 (refd)
China and South Sea Bank Ltd v Tan [1989] 3 All ER 839 (refd)
Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312 (refd)
Heng Cheng Swee v Bangkok Bank Ltd [1976] 1 MLJ 267 (refd)
Hongkong & Shanghai Banking Corp Ltd v Wan Mohd Bin Wan Ngah [1991] 3 MLJ 119 (refd)
Hong Leong Bank Bhd v Percetakan Melati Sdn Bhd [2002] 4 MLJ 70 (refd)

Legislation referred to

Rules of the High Court 1980 O 13 r 7, O 42 r 13, O 83, O 62 r 1(3)
Legal Profession Act 1976 s 56

John Jussem (Battenberg & Talma Advocates) for the appellant.
Grace Yong (Ee & Lim Advocates) for the respondent.

Clement SkinnerJ:

[1] This is the hearing of an appeal against the decision of the learned deputy registrar who on 12 August 2004 dismissed with costs the second defendant's

application to set aside a judgment in default of appearance which was entered against it in this action on 23 October 2003.

[2] The brief facts giving rise to the plaintiff's claim and to this appeal are these.

[3] Upon the application of the first defendant to it, the plaintiff (then known as Bank Utama), at the request of the second defendant agreed to grant the first defendant an overdraft facility (the "'OD facility') of RM35m. The terms and conditions on which the OD facility was granted is set out in a letter of offer dated 21 May 1998 which was duly accepted by the first defendant on 3 June 1998.

[4] As security for the OD facility,

(i) the first defendant executed in favour of the plaintiff a charge instrument No L 8562/1998 over Lot 678 section 66 Kuching Town Land District; and

(ii) the second defendant, by what is popularly referred to as a third party charge, executed in favour of the plaintiff a charge instrument No L8563/1998 over Lots 300 and 460 both of Block 14 Salak Land District; and

(iii) the second defendant also as third party chargor executed in favour of the plaintiff a charge instrument No L. 8630/1998 over Lot 299 Block 14 Salak Land District; and

(iv) the second defendant also executed in favour of the plaintiff two continuing letters of guarantee in the sum of RM20m and RM30mrespectively dated the 25 July 1995 and 21 August 1995.

[5] On 18 August 2003 the plaintiff, alleging that the first defendant was in default of its obligations under the OD facility and that the second defendant was in breach of its obligations under the letters of guarantee commenced legal action against them by causing to be issued out of the Registry of the High Court at Kuching the writ of summons herein which was endorsed with a statement of claim (hereinafter together referred to as 'the writ of summons'). The writ of summons was duly served and received by the second defendant at its registered office on 2 October 2003. On 23 October 2003 a certificate of non-appearance was duly issued by the deputy registrar of the High Court, Kuching pursuant to O 13 r 7 Rules of the High Court ("the RHC"). On the second defendant failing to enter an appearance in this action within the time limited to do so, a judgment in default of appearance was duly entered against it on 23 October 2004.

[6] On 30 December 2003 a copy of the judgment in default of appearance was served on the second defendant. On 3 February 2004 the second defendant served an unsealed copy of an application to set aside the judgment in default on the plaintiff's lawyers and on 20 February 2004 served a duly sealed copy of the application on them.

[7] When the second defendant's application to set aside the default judgment came up for hearing the plaintiff took a preliminary objection that the second defendant had not applied to set aside the default judgment within the period of

30 days set by O 42 r 13 RHC but the deputy registrar exercised discretion in favour of the second defendant to excuse the delay. After hearing the second defendant's substantive application to set aside the default judgment, the deputy registrar dismissed it. Hence this appeal. For completeness I should mention that the plaintiff has obtained judgment against the first defendant who has not taken any steps to set it aside.

[8] In applying to set aside the default judgment entered against it, the second defendant acknowledges that the judgment in default of appearance was obtained regularly against it. It does not seek to show that the default judgment is an irregular judgment or one that was irregularly obtained. The second defendant relies solely on the ground that it has a defence of merits.

[9] The law on the matter at hand is fairly well settled. Under O 13 r 8 RHC the court has a discretion to set aside or vary a judgment entered in default on such terms as it thinks just. How that discretion is exercised is well illustrated in many cases but the courts have always held that where the judgment is regular then there must be an affidavit stating facts showing a defence on the merits. In*Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 Raja Azlan Shah Ag CJ (Malaya) (as His Highness then was) said at pg 24:

> The rule gives the court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

[10] And in *Hasil Bumi Perumahan v United Malayan Banking* [1994] 1 CLJ 328 Haji Mohd Jemuri Bin Serjan CJ (Borneo) gave an indication of what the expression 'a defence on the merits' mean. His Lordship said this at p 334:

> A scrutiny of the case of *Evans v Bartlam* would show that different Law Lords used different terms but they all seem to agree that for the defendant to succeed in his application to set aside a default judgment he must show that the defence had merits that ought to be tried by the court. In other words, in popular language, the defence was not a sham defence.

[11] With that I turn to consider the question whether the second defendant can show a defence on the merits. According to Mr John Jussem of counsel for the second defendant, the following arguable and triable issues have been raised in the second defendant's affidavits (and draft defence) which ought to be tried by the court. They are:

(a) the plaintiff has varied the rate of interest charged but did not give the second defendant notice of such variation (hereinafter 'the variation interest point");

(b) there was a collateral agreement between the plaintiff and the first and second defendant, embodied in a letter dated 24 May 2001, that the plaintiff would accept a lesser sum than presently claimed by the plaintiff (hereinafter the "collateral agreement point");

(c) interest payments made by the second defendant were not taken into account by the plaintiff (hereinafter 'the interest payments not taken into account point');

(d) the letter of offer dated 21 May 1989 did not state when Lot 299 Block 14 Salak Land District should be sold to reduce the borrowing of the first defendant or when the lump sum of RM12m expected from the sale of Lot 299 was to be paid (hereinafter 'the Lot 299 point');

(e) the plaintiff's lawyers had, in breach of r 56 Legal Profession Act 1976, proceeded to enter the default judgment against the second defendant without giving sufficient notice to the second defendant's lawyers before doing so (hereinafter 'the breach of practice and etiquette point');

(f) that the judgment in default which the plaintiff obtained against the first defendant constitutes a bar to the plaintiff's claim against the second defendant (hereinafter "the plaintiff's claim is barred point");

(g) that the second defendant had allowed the judgment in default to be entered against it without proper legal advice (the 'no proper legal advice point');

(h) that by instituting foreclosure proceedings under the charge instruments and also pursuing its claim against the second defendant as guarantor the plaintiff is guilty of instituting a multiplicity of proceedings (hereinafter 'the multiplicity of proceedings point')

[12] I will now take a closer look at each of the issues raised by the second defendant.

THE VARIATION OF INTEREST POINT.

[13] In the plaintiff's letter of offer dated 21 May 1998, one of the terms upon which the OD facility was offered to and accepted by the first defendant was that interest would be charged at 3% per annum (above the plaintiff's base lending rate) which the plaintiff 'may in our absolute discretion vary …. at any time'. The plaintiff was also entitled to charge additional interest at 1% above the prescribed rate should the account be overdrawn for whatever reason. On 1 July 1998 following an application by the first defendant, the plaintiff wrote to the first defendant reducing or revising the rate from 3% to 2.25% per annum (above the base lending rate).

[14] The second defendant contends that it too was entitled to receive notice of variation of interest rates charged to the first defendant failing which the plaintiff was not entitled to reduce the rate of interest. The second defendant argues that since the plaintiff had reduced the rate of the first defendant's interest rate when it had no right to do so, the plaintiff demanded from it (the second defendant) sums to which the plaintiff is not entitled to. According to the second defendant, under cl 8(b)of the instrument of charge which it executed by way of a third party charge, the plaintiff could give notice to it of any change in the rate of interest payable by one of the methods mentioned in that clause ie by posting a notice, or by posting a computer generated notice etc but the second defendant had never received such notice.

[15] I find the second defendant's contention about not being given notice of reduction in the rate of interest being charged to the first defendant fundamentally flawed. This suit is not a charge action brought under O 83 RHC where the plaintiff is seeking to enforce its statutory remedy of sale against any of the second defendant's lands that were charged to it. Neither is this a suit in personam based on the charge instruments. Therefore the terms of the charge instrument such as cl 8 (b) which the second defendant refers to are completely irrelevant to this suit. The second defendant is here being sued as a guarantor, to repay what is owed by the first defendant in respect of the OD facilities made available to the first defendant. One of the terms on which that OD facility was made available to the first defendant was that the plaintiff was entitled to vary the rate of interest at its absolute discretion. When the plaintiff did reduce the first defendant's rate of interest, it did so at the written request of the first defendant and also gave the first defendant written notice of the reduction. The terms in the letter of offer do not impose any obligation on the plaintiff to give notice of variation of interest rate of the OD facility to the guarantors of the first defendant. As between the plaintiff and the second defendant, their obligations to each other are spelt out in the document of guarantee itself, to be determined within the four corners of the guarantee. In *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267 the Federal Court said per Lee Hun Hoe CJ (Borneo) (at p 274):

> A contract of guarantee, like all other contracts, depends primarily upon its expressed terms and the respective rights of the parties must be gathered from the guarantee form used in a particular case.

[16] The second defendant pointed out any term in the letters of guarantee it signed which obliged the plaintiff to give it notice if the first defendant's rate of interest is varied. On the contrary, cl 6 of the guarantee reads in its material parts:

> 6. You may at all times without prejudice to this Guarantee and without discharging or in any way affecting my/our liability hereunder and without any notice to me/us:
>
> (a) determine renew vary restructure earmark or increase any advance credit banking facilities or accommodation given or to be given to the customer (earlier in the guarantee described as the first defendant) or the manner in which the sum is applied or utilised and/or
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) …
>
> (g) …
>
> AND I/We hereby expressly consent to all the above acts on your part (emphasis added).

[17] Therefore, not only was the plaintiff under no obligation to give the second defendant, as guarantor, any notice of variation of interest rates charged to the first

defendant as borrower, but in the light of what it had expressly consented to in para 6 of the guarantee, its proposed defence on this ground is clearly shown to be a sham defence.

[18] The second defendant also complained that there are "inconsistencies" in the rate of interest claimed by the plaintiff because para 5 of the statement of claim states that interest at 3% above the plaintiff's base lending rate was being claimed while the rate claimed in the plaintiff's prayers in para 17 is 3.25% whereas in an affidavit affirmed by Nigel Anak Manjan on 3 March 2004 (on behalf of the plaintiff in these proceedings) he says in para 11 of that affidavit that the interest payable by the first defendant was 2.25%. I see nothing "inconsistent" with the rate of interest claimed by the plaintiff. It is so obvious that the second defendant is trying to create an issue where none exists. The reference to interest rate of 3% above base lending rate in para 5 of the statement of claim refers to the rate of interest at which the OD facility was approved to the first defendant, while in para 11 of En Manjan's affidavit, he was referring to the fact that by its letter of 1 July 1998 to the first defendant, the plaintiff had agreed to reduce the interest rate to 2.25% while the interest rate of 3.25% claimed in the prayer to the plaintiffs statement of claim represents interest at the rate of 2.25% plus the additional interest of 1% per annum for overdue payments. As can be seen from what is stated above, there is no "inconsistency" in the rate of interest claimed by the plaintiff, as the second defendant alleges.

[19] The bona fides of the second defendant in putting forward the variation of interest point as a defence must be seriously questioned. Here the variation resulted in a reduction of the sums payable in the way of interest by the first defendant. This in turn meant a reduction in the second defendant's liability as guarantor. If, as the second defendant now seeks to argue, ie that the variation to the interest rate payable by the first defendant was ineffective because of want of notice, then the rate of interest payable should remain at the higher rate, which in turn means that the first defendant owed more to the plaintiff, which in turn also means that the second defendant's liability as guarantor is more than presently claimed. I do not think any sensible person would pursue such a course of argument which is so clearly detrimental to his own interest. Such an argument is perverse. It is not put forward genuinely. It clearly lacks bona fides.

THE COLLATERAL AGREEMENT POINT

[20] The OD facilities were offered to the first defendant on various terms and conditions set out in the letter of 21 May 1998 (see exh NM7 and NM7A of Nigel Manjan's affidavit affirmed on 3 April 2004).

[21] The collateral agreement which the second defendant refers to is apparently contained in a letter dated 24 May 2001 (hereinafter 'the letter of 24 May 2001') which was written by the plaintiff's lawyers, Messrs Ee & Lim and addressed to the defendant's lawyers Messrs Battenberg & Talma. It seems that by August 1999 the first defendant was in breach of its obligations under the OD facilities as a result of which the plaintiff recalled the OD facility and demanded payment of the entire outstanding account. Following this recall, the parties entered into negotiations

which resulted in a settlement being worked out, the terms of which are set out in Messrs Ee & Lim's letter of 24 May 2001. This is how the plaintiff pleaded the matter in para 8 of its statement of claim. The contents of para 8 are self explanatory so I set it out in full:

> 8. Upon the first defendant's default, the plaintiff was constrained to recall the entire OD Facility and demand was made of the first defendant to repay the entire outstanding account. A letter of demand dated 24 August, 1999 was also issued to the first defendant. However, following discussions and negotiations for settlement, the plaintiff at the request of the first defendant and the second defendant, agreed to restructure the terms of settlement of the monies outstanding and due under the OD facility account. The terms of settlement are set out in a letter dated 24 May 2001, duly endorsed by the first defendant and the second defendant. By the said letter, the first defendant agreed, inter alia, to pay the monthly interest due under the OD facility account, such monthly interest to be paid to the plaintiff on or before the seven day of each month; and that the plaintiffs right and remedies as provided in the letter of offer and the security documents thereto, shall remain intact and the plaintiff can realise the same in the event of the first defendant's default in any manner whatsoever.

[22] Since the second defendant has now tried to raise an issue out of the said letter of 24 May 2001, it is now also set out in its entirety. There is no dispute that the first defendant's former name was Woodhouse Sdn Bhd.

> Re: Borrower: Woodhouse Sdn Bhd (WSB) Guarantor: Ekran Sdn Bhd Overdraft Facility Current Account No 1–005–001232–6
>
> We refer to our letter to you dated 11 May 2001 and your client's appeal to our client by letter dated 23 May 2001.
>
> We are pleased to advise that our client is now agreeable to your client's request not to insist on a lien on the proposed RM5m fixed deposit but on condition that the said fixed deposit must be so held until maturity, whereupon the said sum and accrued interest thereto shall be paid to our client in part payment of the monies outstanding in the account. To avoid any confusion, we restate herewith the terms and conditions for settlement of the outstanding balance for the above account which as at 18 April 2001 is RM23,110,810.82, inclusive of accrued interest calculated from 1 April 2001 up to 17 April 2001, yet to be capitalised. And interest is still accruing from the 18 April 2001 until full settlement. Our client is agreeable to your client's proposal to settle the outstanding balance and all interest accruing and all expenses charges thereto in the following manner:
>
> (i) that your clients will place RM5,000,000.00 in a fixed deposit account with our client for 6 months and must maintain the same in the said account until maturity of the said fixed deposit, whereupon, the principal and interest thereto shall be paid out to our client in part payment of the monies outstanding in the account; and
>
> (ii) that upon the part payment referred to in (i) above, your clients shall from the month following, service the monthly interest due under the account, such monthly interest to be paid to our client on or before the seventh day of each month; and
>
> (iii) that any payment made by your clients in excess of the monthly interest charged while the account is still outstanding shall be treated as payment to reduce the principal under the facility and that there shall not be any further draw down by your clients under the facility; and

(iv) that your clients will fully repay the whole outstanding balance in the account (including principal and interest) within two (2) years from the date of your clients" confirmation of this letter; and

(v) that your clients" guarantor, Ekran Berhad (the Guarantor), shall acknowledge its agreement to the arrangements for settlement set out herein, and shall continue to be bound under the Guarantees dated 25 July 1995 and 21 August 1995 respectively given to our client; and

(vi) that upon your clients" confirmation of this letter and your clients" placement of the fixed deposit pursuant to (i) above, our client shall with-hold further legal action against your clients' and the guarantor unless your clients should default in complying with the conditions herein or under the contract and the security documents for the facility; and

(vii) that our client's rights and remedies as provided in the contract and the security documents between your clients, the Guarantor and our client shall remain intact and our client reserve their right thereto and to realise the same in event that your clients should default in any manner whatsoever.

Your clients are to acknowledge their acceptance of the above conditions by signing and returning to us the duplicate copy of this letter. Messrs Ekran Berhad is also to endorse its acceptance of the above and that it will continue to be bound under Guarantee to our client, by signing and returning to us the duplicate copy of this letter.

As soon as the acknowledgement copy duly endorsed by your clients and Ekran Berhad are returned to us, we shall accordingly release the BC Cheque No 504147 dated the 8 March 2001 for RM5,000,000.00 to our client for placement into the Fixed Deposit Account.

Yours faithfully, Ee & Lim

[23] The plaintiff says the first defendant failed to pay the monthly interest due under the OD facility and so on 27 August 2002 the plaintiff's lawyers wrote to the first defendant's lawyers, Messrs Battenberg & Talma pointing out, inter alia, that the first defendant had not serviced the monthly interest on or before the seventh day of each month, which was one of the terms of settlement agreed to in the letter of 24 May 2001. The plaintiff's lawyers also pointed out that as at 31 August 2001 the outstanding balance was RM20,179,656.96 inclusive of overdue interest of RM868,362.12 and demanded for this outstanding interest to be paid.

[24] In response to what is alleged in para 8 of the statement of claim, the second defendant has in para 7 of its draft defence 'admitted that there were discussions and negotiations capitulating in the letter dated 24 May 2001" and that in actual fact, five (5) interest payments were made to the plaintiff on various dates between 13 October 2001 and 5 June 2002. Then in para 8 of its draft defence the second defendant asserts that the letter of 24 May 2001 was "(i) a collateral agreement which forms part of the facility agreement and (ii) a lesser agreement and/or a contemporaneous agreement in respect of a lesser sum than is currently claimed by the plaintiff.

[25] It should be noted that apart from what is pleaded above, nowhere does the second defendant say in any of the affidavits filed on its behalf in these proceedings what was the 'lesser sum than the plaintiffs current claim' which the plaintiff had allegedly agreed to accept in the letter of 24 May 2001. In the circumstances I find this allegation that there was a collateral agreement that the plaintiff agreed to accept

a lesser sum than is currently being claimed by it, a very vague, imprecise and equivocal assertion. The assertion of the second defendant is also contradicted by the contents of the letter of 24 May 2001 which is a document written contemporaneously with the events that were then unfolding. In that letter the plaintiff clearly indicated that the outstanding balance as at 18 April 2001 was RM23,110,810.82 inclusive of accrued interest calculated from 1 April 2001 to 17 April 2001, yet to be capitalised and still accruing from 18 April 2001 until full settlement. There is no indication in that letter that the plaintiff had agreed to a lesser sum than is currently claimed. The contention of the second defendant regarding the collateral agreement seems to imply that the plaintiff was in breach of that agreement when it commenced this suit which in turn gives rise to a triable issue. Such an argument is clearly not maintainable because one of the matters which the first defendant had agreed to in the letter of 24 May 2001 was that it would pay the monthly interest due under the OD facility. It is the plaintiff's case that the first defendant defaulted in paying the monthly interest due under the OD facility account (see para 9 of the statement of claim). This is also the position expressed in the plaintiff's lawyers letter to the first defendant's lawyers dated 27 August 2002 which is exhibited as NM11 of Nigel Manjan's affidavit affirmed on 3 March 2004.

[26] If the first defendant had not serviced the interest payments as it had agreed to, this would certainly entitle the plaintiff to enforce its rights against the first defendant because in para (vi) of the letter of 24 May 2001 it is stated:

> (vi) that upon your client's confirmation of this letter and your clients' placement of the Fixed Deposit pursuant to (i) above, our client shall withhold further legal action against your clients and the Guarantor unless your clients should default in complying with the conditions herein or under the contract and the security documents for the facility,

[27] As I indicated a moment ago, the plaintiff's complaint was not that the RM5m fixed deposit was not placed; it was that the monthly interest payments were not paid on their due dates.

[28] Accordingly, there is nothing stated in the second defendant's proposed defence or its affidavits which disclose any facts that require to be investigated further at a trial on this alleged issue.

THE PAYMENTS NOT TAKEN INTO ACCOUNT POINT

[29] I mentioned a moment ago that what eventually led to the OD facilities being terminated and recalled was the first defendant's failure to pay the monthly interest on the OD facility on their due dates (see paras 9, 10 and 11 of the statement of claim). But the second defendant says in its proposed defence that it had made five interest payments to the plaintiff on the following dates. Therefore the second defendant contends that the first defendant was not in default as alleged:

(1) 13 October 2001
RM5,019,849.32

(2) 27 October 2001
RM 173,006.35

(3) 24 December 2001
RM 152,247.98

(4) 16 January 2001
RM 158,193.18

(5) 5 June 2002
RM 157,878.36

[30] I regret I do not see the above facts asserted by the second defendant as giving rise to any triable issue. From the particulars supplied by the second defendant itself regarding the dates on which these payments were made, they certainly do not show that these interest payments were made on or before the seventh day of each month. Besides, from the second defendant's own particulars, no interest payment was made in February, March, April and May 2002. Surely these were clear breaches of the settlement terms set out in the plaintiff's lawyer's letter of 24 May 2001.

[31] Quite apart from what is stated above, the second defendant's assertion that the plaintiff had failed to take into account the five interest payments has been shown to be unfounded and baseless. The plaintiff produced as exh NM10 to Nigel Manjan's affidavit affirmed on 3 April 2004, a statement of account of the first defendant in which detailed calculations of interest charged and the dates of credits into the account are shown between 31 May 2001 through to 31 October 2002. This account shows that each of the five payments have been duly credited and taken into account in calculating the balance owed by the first defendant, although I should point out that the first payment of RM5,019,849.32 is not a payment of interest as alleged by the second defendant but a fixed deposit which was uplifted on 13 October 2001. While considering this point taken by the second defendant it is important not to overlook the fact that a judgment in default has been entered against the first defendant. To date the first defendant has not made any attempt to set aside the judgment or even to challenge the judgment sum. If as alleged by the second defendant certain payments have been made on behalf of the first defendant which have not been taken into account by the plaintiff, meaning in turn that judgment was entered against the first defendant for an excessive sum, then it is strange that no attempt has been made to question the judgment.

THE LOT 299 POINT

[32] The second defendant has in its submissions drawn attention to the fact that in para 7 of its statement of claim the plaintiff had alleged that the OD facility was to have been repaid by a lump sum payment of RM12m within 12 months from the 21 May 1998 to discharge Lot 299 and by way of yearly reduction of RM3.5m. In its proposed defence the second defendant takes the point that the letter of offer did not expressly state that the RM12m would be paid within 12 months from 21 May 1998 as alleged by the plaintiff. It is correct that the letter of offer does not say when the RM12m is to be repaid but I do not see this fact as giving rise to any triable issue because whatever may have been the nature of the first's defendant's alleged breaches

of the terms of the letter of offer which culminated in the entire facilities being first recalled, the parties agreed, after negotiations, how the OD facilities were to be repaid to the plaintiff. This is set out in the letter of 24 May 2001 and it is the default made in the payment of monthly interest as set out in that letter that finally led to the plaintiff terminating, by its lawyers" letter of 22 October 2002, the OD facility and demanding payment of all the outstanding sums from the first defendant as borrower and the second defendant as guarantor.

THE BREACH OF PRACTICE AND ETIQUETTE POINT

[33] The complaint here is that in entering the judgment in default of appearance against the second defendant on 23 October 2003, the plaintiff's lawyers had (and here I quote counsel for the second defendant) 'breached r 56 Legal Profession Act 1976' in failing 'to provide sufficient notice to the second defendant's solicitors before judgment was entered". It was alleged by counsel that 'there was no excuse whatsoever for the plaintiff's solicitors not to serve the writ and statement of claim to (sic) the second defendant's solicitors and to give notice of at least seven days or 48 hours prior to entering judgment'.

[34] I find this a thoroughly misconceived defence. In the first place r 56 of the Legal Profession Act 1976 (Act 166) and the rules made thereunder have no application whatsoever in Sarawak. That law only applies in West Malaysia and has not been made operational in Sarawak. Sarawak has its own regulations to regulate the conduct of advocates in the state. Pursuant to the powers contained in s 17 (a) of the Advocates Ordinance, Cap 110 Laws of Sarawak, the Advocates (Practice and Etiquette) Rules 1988 have been made. Rule 56 (which is pari materia with r 56 of the Legal Profession Act 1976) reads:

> 56 Where the name of the advocate and solicitor or his firm appears on the court record or the fact of representation is known to the other side, no advocate and solicitor representing the other party to the proceedings shall enter judgment by default against the client of the first-named advocate and solicitor or to take advantage of delay in pleading or filing documents in the nature of pleadings or in taking any necessary steps or in complying with any other proceeding by such first-named advocate and solicitor, unless he shall have given to such first-named advocate and solicitor written notice of his intention to do so, and forty eight hours shall have elapsed after the delivery of such notice to the first-named advocate and solicitor.

[35] The first thing to note about r 56 is that the name of the advocate and solicitor of the other side or his firm must appear on the court record. In this case there is no evidence before the court that the name of the second defendant's advocate or the name of his firm was on the court record in this suit when the plaintiff's lawyers took steps to enter the default judgment. The second point to note about r 56 is that the plaintiff's lawyers would be bound by the rule if 'the fact of representation' was known to them. The facts here show that while the plaintiff's lawyers were aware that Messrs Battenberg & Talma had acted for the first and second defendants in respect of the negotiations arising from the first recall of the OD facilities and had corresponded with them on the matter and while it seems the plaintiff's lawyers also knew that Messrs Battenberg & Talma had acted for the first

A and second defendants in the charge actions brought by the plaintiff under O 83 RHC, the fact remains that after the writ of summons herein was served on the first and second defendants on 2 October 2003 and 29 September 2003 respectively, the plaintiff's lawyers wrote to Messrs Battenberg & Talma informing them of the service of the writ of summons on the first and second defendants enquiring whether, in B view of the fact that Messrs Battenberg & Talma were acting for the first and second defendants in the charge actions, they would also be representing the first and second defendants in this suit, so that a copy of the writ of summons could be forwarded to Messrs Battenberg & Talma for their attention if they were so acting. There was no reply from Messrs Battenberg & Talma although they acknowledged receiving the plaintiff's lawyers' letter dated 4 October 2003. In light of the above facts it lies ill C in the mouth of the second defendant to now complain about the conduct of the plaintiff's lawyers when it is the second defendant's own lawyers who took no steps to inform the plaintiff's lawyers that they were or would be acting for the second defendant in this suit, so that the plaintiff's lawyers would then be bound by the second limb of rule 56 and have to comply with its provision.

D

[36] With regard to the second defendant's complaint that the writ should have been served on its lawyers, there is no requirement to do so unless the second defendant's lawyers had indicated in writing to the plaintiff's lawyers that they had authority to accept service of process on behalf of the second defendant (see O 62 E r 1(3) RHC. There is no evidence before the court that the plaintiff's lawyers were ever informed that Messrs Battenberg & Talma had authority to do so.

THE PLAINTIFF'S CLAIM IS BARRED POINT

F **[37]** Although that is how counsel for the second defendant had described the second defendant's proposed defence on this ground, what the second defendant is really saying is that since the plaintiff had sued both the first and second defendants in this action, when the plaintiff proceeded to obtain judgment in default of appearance against the first defendant, the second defendant had been discharged of his liability as the plaintiff's cause of action against him had merged in the judgment G obtained against the first defendant. Hence the plaintiff's claim against the second defendant is now barred.

[38] What the second defendant is trying to apply here is a technical rule of law ' that where there are joint contractors if judgment is signed against one the other is H discharged". This is the rule Scrutton LJ spoke of in*Parr v Snell & Ors* [1923] 1 KBD 1 which was relied on by RK Nathan J in *Asia Commercial Finance (M) Bhd v Island Rentals Sdn Bhd & Ors* [1994] 4 MLJ 105 The same learned judge later followed and applied his decision in Asia Commercial Finance in*Hong Leong Bank Bhd v Percetakan Melati Sdn Bhd* [2002] 4 MLJ 70 both of which cases are now relied on by the second defendant here.

I

[39] To see whether this issue raised by the second defendant gives rise to a triable issue, I think it is important to understand the ratio of the decision in *Parr v Snell.* In that case the plaintiff entered into an agreement with the defendants in respect of the resale of shares upon the plaintiff relinquishing his post as secretary in the

defendant's company. To determine the true nature of the contract entered into both Lord Sterndale MR and Scrutton LJ held that it was important to look into the language of the agreement to determine whether it was a joint contract or a joint and several contract as upon the determination of that question, lies the application of the technical rule of law "that where there are joint contractors if judgment is signed against one the other is discharged" (per Scrutton LJ at p 9) or "[where] in a joint contract, there has been a final judgment signed against two of the three joint contractors; it is not competent for the plaintiff having obtained final judgment against two of the joint contractors to proceed against the other" (per Lord Sterndale MR at p 4). In coming to their above findings, Lord Sterndale had said 'I cannot agree with the learned judge that this was a joint and several contract. I think it is a joint one; it is only necessary to read it in order to see that. It is not a matter that admits of much discussion; it entirely depends upon the conclusions to be drawn from the language of the agreement ….'. Lord Scrutton LJ held the view that it was a joint contract when he said 'The two Snells and Quertier agree that if the secretary relinquishes his position his shares be purchased from him by a person either appointed by them or by persons delegated by them. That seems to me to be a contract to find a purchaser approved by the three and to be clearly a joint and not a several contract. That being so, in this case judgment has been signed against two and the third is discharged under the technical rule in *Kendall v Hamilton* unless there is some rule or statute which prevents the operation of the old rule'.

[40] Reverting to the facts of this case, I agree with Ms Grace Yong, counsel for the plaintiff that while the first defendant and the second defendant may be liable to repay the same debt, their obligation to do so is not a joint one; it is several. Whereas the obligation of the first defendant as borrower arises under the letter of offer, that of the second defendant arises under the letter of guarantee. The plaintiff has two distinct causes of action against the first and second defendant respectively; against the first defendant it is as borrower and against the second defendant it is as guarantor. The liability of the first and second defendants being several and distinct and not joint under the respective contracts each have entered into with the plaintiff, I just do not see how it can be argued that they are joint contractors so that a judgment signed against one will discharge the other. The plaintiff's cause of action against the second defendant as guarantor, being based on the letter of guarantee could not have merged in the judgment obtained against the first defendant which is based on a distinct and separate cause of action.

[41] For the above reasons I find no triable issue raised on this ground too.

THE NO PROPER LEGAL ADVICE POINT

[42] The defendant says that when the writ of summons was served, its employees did nothing about the matter. Although they forwarded a copy of the writ of summons to their headquarters in Kuala Lumpur, there was 'a communication lapse' between the two offices, although the second defendant did not elaborate what this lapse consisted of and how it was occasioned. In Kuching itself, the second defendant's employees did not take any steps to seek legal advice from any law firm about the writ of summons or forward a copy of it to any law firm or to Messrs

Battenberg and Talma because according to the 2 defendant, they wrongfully thought that this suit formed part and parcel of the charge action in OS-24–79–2003-I which the plaintiff had instituted to apply for a sale of the land charged to it by the second defendant by way of security for the OD facilities.

[43] It is clear from what is stated above that the judgment in default was entered against the second defendant due to its own shortcomings and fault. It would be unjust to blame the plaintiff for the second defendant's own shortcomings. No triable issue can arise out of such a situation. The fact that such a ground is put forward as a proposed defence shows lack of bona fides.

The multiplicity of proceedings point

[44] It is not in dispute that besides filing this suit against the second defendant as guarantor, the plaintiff has also taken steps to enforce the security it took over the second defendant's land mentioned at the beginning of this judgment, by applying to have those lands sold pursuant to s 148 Sarawak Land Code and the provisions of O 83 RHC. Two such charge actions have been commenced by the plaintiff vide OS-24–79–2003–I and OS-24–275–2004-II. Although I am not informed which of the second defendant's land are involved in each of these actions, apparently an order for sale has been granted in the first charge action while in the second charge action no order for sale has been granted yet.

[45] It is the second defendant's contention that the plaintiff should recover whatever is owed from the first defendant first and it is only when the amount realised from the first defendant is insufficient, would the second defendant's liability under the guarantee arise. According to the second defendant, instead of pursuing its claim in the manner described above, the plaintiff has by instituting the aforementioned charge actions as well as this suit, abused the process of court by launching multiple actions.

[46] In support of its contention, counsel for the second defendant relied on the decision of Lamin J, (as he then was) in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd Bin Wan Ngah* [1991] 3 MLJ 119. That was a case where the plaintiff bank had granted a loan to the defendant borrower to finance a housing project on a piece of land which same piece of land was taken as the only security for the loan. The bank then brought foreclosure proceedings against the land concurrently with a civil suit to recover the amount owed by the defendant borrower. The headnotes of that case, which the second defendant relies on, shows that it was held:

> (1) The Court found that if the amount realised by the charge on the sale of the charged land was less than the amount due to the chargee, the chargor shall pay to the chargee the difference between the amount due and the amount so realised. So the personal liability of the chargor was only to the extent of the extent of the balance of the amount due (cl 8). Upon reading the charge annexure as a whole, both the chargee and chargor were bound by the terms and conditions of the charge and to realise the amount owing, the land must be sold in accordance with the provisions of the National Land Code 1965. If the amount

realised from the sale was not sufficient to cover the amount due then it was implied that a separate action be taken against the debtor/chargor to recover the balance should he fail to pay the difference.

[47] I regret to say that counsel for the second defendant had not given the decision in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd Bin Wan Ngah* a proper and correct reading. If he had he would have found that the facts of that case are clearly distinguishable from the facts in this case because in that case there was no third party who had provided a guarantee and the charge annexure was the only form of security for the loan. Accordingly, the decision in that case turned on what the parties had agreed to in the charge annexure, in particular cl 8 thereof. This is made very clear at the second part of the headnotes in that case at Held (2) which states:

(2) There is no guarantee involved in the case before me. The only form of agreement or covenant agreed to by both the plaintiff (the chargee) and the defendant (the chargor) is the annexure of the charge which carries the terms and conditions of the charge. The real intent of cl 8 of the annexure appeared to be that when the loan became payable, the plaintiff would immediately become entitled to recover and when he decided to proceed to recovery, he must exercise his rights and powers as provided in the annexure of charge.

[48] In fact Lamin J was very careful in that case to point out that he was not there dealing with a case where in addition to the charge annexure, there was also a guarantee. Lamin J, also took the trouble, after reviewing the cases that were cited to him, to point out what the general attitude of the court has been in instances where a loan is secured by a charge and guarantee. At p 122 para "H" of the report, Lamin J, said:

In the cases cited above where the loan was secured by two collateral securities, namely, a charge and a guarantee, our courts generally have taken the view that it is not required to realise the security under the charge before enforcing the guarantee.

[49] So clearly, what was said in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd Bin Wan Ngah* is of no assistance to the second defendant here. Nor was cl 18 of the letter of guarantee in this case which counsel for the second defendant chose only to read a part of instead of reading the clause as a whole as he should have done. Clause 18 reads:

You are at liberty but not bound to resort for your benefit to any other means of obtaining payment or securing performance at any time and in any manner or order as you may deem fit without affecting the security evidenced by this Guarantee. You may exercise and enforce your rights under this Guarantee either before resorting to any other means of obtaining payment or securing performance or after such means have been resorted to in respect of any balance due or outstanding liabilities or obligations and in the latter case without entitling me/us to any benefit from such other means so long as any sum liability or obligation remains due or owing or payable or outstanding (whether actual or contingent) from the customer to you.

[50] By agreeing to provide the plaintiff with an absolute discretion in cl 18 whether to enforce its rights under the guarantee either before or after resorting to

any other means of obtaining payment, surely the second defendant cannot now be heard to complain when the plaintiff does exercise that right. Further, by cl 19 of the guarantee the second defendant expressly agreed that any sums not recoverable on the footing of a guarantee, shall nevertheless be recoverable from it as the sole or principal debtor and the last sentence in cl 20 of the guarantee reads:

> The rights powers privileges and the remedies provided in this Guarantee are cumulative and not exclusive of any rights powers privileges or remedies provided by law

[51] It is well accepted that when a chargee applies for a sale of charged land he is exercising a statutory remedy provided by law. Given the above clauses in the guarantee, clearly it was open to the plaintiff to proceed simultaneously against the second defendant as guarantor and exercise its statutory remedy of sale under the law as well. This case falls within the general rule so clearly stated by Lord Templeman in *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839, p 842 that where a creditor takes security for a loan in the form of a guarantee and mortgage over shares that:

> The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgaged securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.

[52] The above decision was applied by our Supreme Court in*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 43. Accordingly I find no triable issue arises on the second defendant's complaint of multiplicity of actions.

[53] In the result, I dismiss the second defendant's appeal with costs.

Second defendant's appeal dismissed with costs.

Reported by Peter Ling